

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR

&

THE HONOURABLE MR. JUSTICE K.M.JOSEPH

FRIDAY, THE 4TH AUGUST 2006 / 13TH SRAVANA 1928

C.E.Appeal.No. 1 of 2006()

A.NO.E/466/2003 of CUSTOMS,EXCISE&SERVICE TAX APP.TRIBUNAL,BANGALORE
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APPELLANT

THE COMMISSIONER OF CENTRAL EXCISE,
COCHIN COMMISSIONERATE, C.R.BUILDINGS,
I.S.PRESS ROAD, KOCHI-18.

BY ADV. SRI.JOHN VARGHESE, ASSISTANT SG

RESPONDENTS:

M/S.PACKARD INDUSTRIES,
KARAPUZHA, KOTTAYAM, KERALA.

BY ADV. SRI.JOSEPH KODIANTHARA
SRI.MITHUN MARKOS

THIS CENTRAL EXICISE APPEAL HAVING BEEN FINALLY HEARD
ON 04/08/2006, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

Dated this the 4th day of August, 2006

JUDGMENT

Ramachandran Nair,J.

This appeal is filed against Annexure F order of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Bangalore, whereunder the Tribunal reversed the clubbing of clearances by the respondent from the factory with the previous clearances by previous owner and declined SSI exemption available to small scale industrial unit for clearances upto Rs. 1 crore under Annexure A notification. The question involved is whether the clearances of the respondent are within the limit entitling them for exemption under Annexure A notification and therefore the appeal is maintainable before this Court under Section 35G (1) of the Central Excise Act is the contention raised by the Asst. Solicitor General of India appearing for the appellant. However, respondent's counsel contended that the exemption under Annexure A notification is described as Nil rate of duty which also being the rate of duty, the appeal is not maintainable under Section 35G of the Act.

2. In order to consider the issue we have to refer to Section 35G

(1) as substituted by Act 32 of 2003 with effect from 14.5.2003 which is as follows:

Section 35G. **Appeal to High Court** (1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question, having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.

It is clear from the exception clause contained in the above Section that an order relating, among other things, to the determination of any question having a relation to rate of duty of excise or to the value of goods for purposes of assessment is not appealable to the High Court. The question in this case is respondent's eligibility for exemption under Annexure A notification which essentially depends upon the clearances made by the respondent during the relevant year. According to the revenue, clearances from the same factory by different manufacturers can be clubbed for the purpose of considering whether the manufacturer has exceeded threshold limit for exemption under

clause (vi) of paragraph 2 of Annexure A notification. The Tribunal held that such clubbing is not permissible and by reference to clause (v) of paragraph 2 of Annexure A notification, the Tribunal allowed the respondent's appeal. Therefore the question involved is the interpretation of Annexure A notification and to our mind there is no dispute with regard to rate of duty or valuation of goods. However, we are bound by two decisions of the Supreme Court relied on by counsel for the respondent, namely, NAVIN CHEMICALS MFG. & TRADING CO. LTD. V. COLLECTOR OF CUSTOMS, (1993) 68 E.L.T. 3 (SC) and COLLECTOR OF CENTRAL EXCISE, HYDERABAD V. VAZIR SULTAN TOBACCO CO.LTD., (1996) 83 ELT 3 (SC). While in the first decision above referred, the Supreme Court held that whether a manufacturer is entitled to exemption under notification also is a matter pertaining to rate of duty, in the second decision the Supreme Court held that nil rate is also rate of duty. Even though counsel for the appellant contended that in the first decision the Supreme Court was dealing with exemption pertaining to goods and not in relation to a manufacturer, we do not think we should draw any such distinction for considering the maintainability because decisions were rendered several years back and none of the authorities has

chosen to clarify as to which are the matters on which High Court can entertain appeals. Section 35G, to our mind, is not happily worded. Instead of defining the appellate power in the negative, Parliament could have stated which are the matters on which appeal is maintainable to the High court. In the circumstances, and in view of the two decisions of the Supreme Court above referred, we hold that appeal is not maintainable and we therefore dismiss the appeal as such. However, we place on record that the appeal was filed in this Court on 7.2.2006 and it would be open to the appellant to bring to the notice of the Supreme Court the long pendency of the appeal before this Court at the admission stage of the appeal, if the appellant wants to file appeal before the Supreme Court, for the purpose of condonation of delay.

(C.N.RAMACHANDRAN NAIR)
Judge

(K.M.JOSEPH)
Judge

